

ARKANSAS COURT OF APPEALS

DIVISION IV

No. CA08-135

MICHAEL COLSTON

APPELLANT

V.

LATCO, INC. and AIG Claims Services

APPELLEES

Opinion Delivered September 3, 2008

APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION
[NO. F510010]

AFFIRMED

JOSEPHINE LINKER HART, Judge

The Arkansas Workers' Compensation Commission found that the claim for workers' compensation benefits by appellant, Michael Colston, was barred by *Shipper's Transport of Georgia v. Stepp*, 265 Ark. 365, 578 S.W.2d 232 (1979). Appellant argues for reversal, contending that appellees failed to establish the elements of the *Shipper's* bar. We affirm.

In *Shipper's*, the Arkansas Supreme Court adopted the rule that a claimant's false representation regarding his physical condition in procuring employment will bar the claimant from obtaining benefits if the employer shows that (1) the employee knowingly and willfully made a false representation as to his physical condition; (2) the employer relied on the false representation and that reliance was a substantial factor in the employment; and (3) there was a causal connection between the false representation and the injury. Whether or not these factors exist are questions of fact for the Commission to resolve, and on appeal, we consider

whether the Commission's findings are supported by substantial evidence. *Newsome v. Union 76 Truck Stop*, 34 Ark. App. 35, 805 S.W.2d 98 (1991).

Appellant acknowledges that he made a false representation of his physical condition. On a physical assessment disclosure, appellant denied having had a back injury, surgery of any kind, or a preexisting condition or impairment that was permanent in nature. Appellant testified that he had back surgery at L5-S1 following a lifting injury in 1996 and that additional back surgery was recommended following a lifting injury at the same level in 1998. He also acknowledged that following the 1996 surgery, a physician opined that appellant qualified for a ten-percent impairment to the body as a whole and a permanent twenty-five pound lifting restriction.

Regarding his current claim, appellant testified that in 2005 he injured his back while lifting a heavy ramp in his employment with appellee LATCO. He contended that his main problem following the 2005 injury was on his right side while on the two previous injuries his problem was on the left side. He further asserted that he was released to work at full duty in 2003 by another physician, though he admitted that the physician did not examine him and had not treated him.

Appellant first argues that there is no substantial evidence to support the Commission's finding that LATCO relied on a false representation and that this reliance was a substantial factor in the hiring. At the hearing, appellees presented the testimony of Larry Stubbs, who was the director of human resources of LATCO. He testified that the human resources department makes the final hiring decision. According to him, if there is a "yes" answer on

the medical questionnaire, he questions the applicant. However, because appellant answered “no” on the questionnaire, he never had the opportunity to speak with appellant. Further, Stubbs stated that because the work was physically demanding, if he had known about the two previous back injuries he would not have felt comfortable with putting appellant to work. According to Stubbs, if appellant had admitted that he had back trouble and back surgery, then before the hiring process was complete, Stubbs would have required appellant to obtain information from his physician as to whether or not appellant had any restrictions or what appellant could do and that Stubbs might have sent a job description of what the job entailed and allowed the physician to opine on whether appellant was capable of performing the work. Stubbs admitted, however, that having back surgery did not automatically disqualify appellant for employment, but that it was a “red flag,” and Stubbs would not “place somebody in a position of peril.”

We hold that substantial evidence supports the Commission’s conclusion that reliance on appellant’s false representations was a substantial factor in the decision to hire him. Because of appellant’s untruthful statements on the medical questionnaire, LATCO’s human resources director was not apprised of appellant’s medical condition, and appellant was consequently hired without further inquiry into his medical problems. Accordingly, we affirm the Commission’s decision on this point.

Further, appellant argues that there is no substantial evidence to support the Commission’s finding that a causal connection existed between the false representation and the injury. Appellees, however, submitted a medical record review from Brent Sprinkle, D.O.

In the review, Sprinkle considered whether appellant's current diagnosis at L5-S1 bore a causal relationship to his preexisting problems at that level. Sprinkle opined, "with one hundred percent certainty," that appellant's current diagnosis at that level "had a greater likelihood to occur" because of appellant's preexisting diagnosis at that level.

The 2005 injury was at the same level, and Sprinkle in essence opined that there was a causal relationship between the preexisting and current problems. Given this evidence, we cannot say that substantial evidence does not support the Commission's conclusion that appellees proved a causal connection between appellant's false representation and his injury. *See Tahutini v. Tastybird Foods*, 18 Ark. App. 82, 711 S.W.2d 173 (1986). Accordingly, we affirm.

Affirmed.

HEFFLEY and BAKER, JJ., agree.